77-1009

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1977

HERBERT L. HEDGEMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Herbert L. Hedgeman, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of The United States Court Of Appeals For The Seventh Circuit, entered in the above-entitled cause November 2, 1977.

OPINIONS BELOW

The opinion of The United States Court of Appeals for the Seventh Circuit No. 77-1184 is unreported and is printed in Appendix hereto, infra, page 1a. The opinion

of the United States District Court for the Northern District of Illinois, Eastern Division, No. 73 CR 42, is unreported and is printed in Appendix hereto, infra, page 14a.

JURISDICTION

The Judgment of the United States Court of Appeals for the Seventh Circuit, was entered on November 2, 1977. A timely Petition for Rehearing was denied on December 20, 1977 and this Petition for Certiorari was filed within 90 days of that date. (Appendix, infra, page 19a.) The jurisdiction of the Supreme Court is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

Whether, the decision of the panel below may require, in absence of any Supreme Court decision, that in a case involving intentional prosecutorial suppression, the Defendant to prove due diligence in failing to discover the intentionally suppressed evidence.

2. Whether, in the same circumstances as those above, the evidence so suppressed, must be proved "exculpatory" and not merely "cumulative and impeaching" before a Rule 33 FRCP motion for new trial may be granted.

STATUTES INVOLVED

1. Rule 33 FRCP Motion for New Trial (Appendix hereto, infra, page 20a.)

2. 18 U.S.C., §287, Appendix hereto, infra, page 15a.

3. 18 U.S.C., §2(a) Appendix hereto, infra, page 15a.

4. 18 U.S.C. §1010 Appendix hereto, infra, page 16a.

5. 28 U.S.C. §2255 Appendix hereto, infra, page 16a.

6. The United States Constitution, Fifth Amendment due process clause. Appendix hereto, infra, page 18a.

STATEMENT OF CASE

Petitioner, Herbert L. Hedgeman, was tried on sixteen counts: one count of conspiracy (18 U. S. C. §286), seven counts of false claims (18 U.S.C. §287), four counts of false statements (18 U.S.C. §1010), and four counts of aiding and abetting false statements (18 U.S.C. §§1010 and 2(a)). He was acquitted on two of the substantive counts and convicted on three counts of §287, four counts of §1010, and four counts of §§1010 and 2(a)). Two substantive counts were dismissed by the government at trial.

Subsequent to his conviction, defendant filed a motion for new trial pursuant to Rule 33, FRCP, based upon the constitutional contention that the prosecutor intentionally suppressed evidence thereby allowing a government witness, one Pearson, to give perjured testimony.

Petitioner Hedgeman was Area Management Broker for the Federal Housing Administration (FHA), and was accused by Pearson, an unindicted co-conspirator, of taking regularly paid kickbacks on FHA contracts which Pearson had obtained through the Petitioner's intercession. Pearson corroborated his testimony by introducing into evidence nine worksheets, each of which contained notations of the alleged kickbacks. Pearson also testified, on cross examination, that before surrendering these worksheets to the government for use at Petitioner's trial,

Pearson had not had any examination or tests made of them to determine the age of the writing.

Subsequent to the trial defense counsel learned from one Purtell, an expert document analyst, that he had been employed during the trial to examine the work-sheets and had discovered that the documents had been examined by another analyst, presumably during Pearson's possession of the papers. The documents concededly had not been examined at the behest of the government, prior to Pearson's testimony.

Petitioner's Motion for New Trial was denied in the District Court without benefit of a hearing and attendant discovery on all issues to determine materiality as to perjury and suppression. The judge assumed that there was perjury or false testimony by Pearson and that the government attorney had deliberately withheld evidence of perjury; however, the Court held, without granting a hearing, that the government's knowing use of Pearson's perjured testimony was not material.

On appeal, the panel decision affirmed the lower Court ruling and further held that the defense counsel did not use diligence to discover the "Purtell" evidence; that Purtell's testimony only went to impeachment, was cumulative and not exculpatory. Petition for Rehearing was denied.

REASON FOR GRANTING WRIT

THE DECISION BELOW CONFLICTS WITH THE SOLE OTHER CIRCUIT AS TO THE TEST TO BE APPLIED IN GRANTING OF A RULE 33 FRCP MOTION IS BASED UPON A CONSTITUTIONAL CONTENTION.

The crucial question here is whether the tests of (1) "due diligence" and, (2) that the new evidence is "exculpatory and not just cumulative and/or impeaching" (which tests have traditionally been applied where a Rule 33 motion for new trial is based upon the discovery of new evidence from a neutral source) may also apply where the Rule 33 motion is premised upon a constitutional contention, namely: knowing use of perjured or false testimony by the government.

The one Circuit Court case to consider the issue squarely, held, as acknowledged by the panel decision, that the due diligence test is inapplicable to constitutionally grounded Rule 33 motions for new trial on the basis of new evidence. See: *Marshall* v. *United States*, 436 F.2d 155, 159 and n. 11 (D.C. Cir. 1970). And as importantly, the two Circuit Court cases cited by the panel decision as authority have either been overruled by the Supreme Court, ir part, or have strong language contrary to the interpretation by the panel decision.[1]

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[1] The panel decision cites *United States* v. *Iannelli* 528 F.2d 1290, 1292-1293 (3rd Cir. 1976). Surprisingly, a close reading of *Iannelli* supports the defendant's contention and not that of the panel. In *Iannelli*, the Third Circuit held that the due diligence standard did prevent the petitioner from prevailing on his Rule 33 motion for new trial. However, that petitioner did base his motion upon a constitutional or due process theory. The Third Circuit specifically stated that it would allow the petitioner to resubmit

The panel decision held that those tests may apply to a Rule 33 motion even where the motion is constitutionally grounded and that they were applicable in the instant case.

In response, defendant notes that the "due diligence" and "cumulative, impeachment" tests have never been applied by the United States Supreme Court in any case involving intentional prosecutorial suppression of evidence or knowing use by the prosecution of perjured or false testimony. See: *Napue* v. *Illinois*, 360 U.S. 264, 269, 271 (1959); *Brady* v. *Maryland*, 373 U.S. 83, 86-87 (1963); *Giglio* v. *United States*, 405 U.S. 150, 153 (1972); *Moore* v. *Illinois*, 408 U.S. 786, 794-798 (1972); *Miller* v. *Pate*, 386 U.S. 1, 7 (1966).[2]

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[1] (Continued)
his contention if it was constitutionally grounded or based upon fundamental fairness and that the petition could be resubmitted under 28 USC 2255. In the other case cited by the panel decision, *U. S.* v. *Bermudez*, 526 F. 2d 89, 100 (2nd Cir. 1975), cert. denied, 425 U.S. 970, (1976), the Second Circuit, in dictum, did state that the due diligence standard applied to Rule 33 motions grounded upon constitutional issues. However, that Court also held that the traditional materiality test for Rule 33 motions also applied to Motions constitutionally grounded; yet, the Supreme Court in *United States* v. *Agurs*, 427 U.S. 97, 111 (1976) held that the "Napue" and not the Rule 33 materiality test applied where the motion for new trial is based upon a constitutional contention.

[2] The constitutional tests set forth in *Napue, supra*, is as follows: "First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment," and that the conviction will be reversed where the false evidence could "in any reasonable likelihood have affected the judgment of the jury". (360 U.S. at 269 and 271).

In fact, contrary to the panel decision, the Supreme Court has specifically held that the constitutional test does not depend upon an exculpatory versus impeachment dichotomy of the undisclosed evidence.[3]

Moreover, the panel decision cites the above noted Rule 33 tests, but additionally took note that there are three other tests under motions for new trial, namely; no prior knowledge, new evidence would probably produce different results and production of witness affidavit with motion. As the panel decision acknowledged, just recently the Supreme Court specifically held that the *Napue* materiality test and not the traditional Rule 33 test controls where the motion for new trial is based upon a constitutional claim. (See *Agurs, supra*). The panel decision further acknowledged that the government brief in the instant case conceded that the traditional Rule 33 tests of cumulativeness and impeachment do not apply where the motion is constitutionally based. The panel decision did not mention the government concession that the Rule 33 test of due diligence is also inapplicable where the issue is constitutional in nature.

If the panel decision is allowed to stand there will be the following consequences: First, it can be expected that the government will use this case as authority for arguing in every Rule 33, intentional suppression case that defense counsel did not use due diligence and where applicable that the suppressed evidence is cumulative and impeaching and not exculpatory and original. Secondly, there would be created an anomaly because after the panel decision the defendant on a Rule 33 motion

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[3] Napue: "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence". (360 U.S. at 271).

for new trial based upon prosecutorial suppression of evidence would have to satisfy or contend with meeting and satisfying the due diligence and cumulative, impeachment tests. However, he would not have to meet these tests if he simply collaterally attacks his conviction under a Petition for Habeas Corpus pursuant to 28 USC 2255. Finally, the panel decision may be authority for allowing the State and Federal government to argue that a Petition for Habeas Corpus under 28 USC, §§2254 and 2255 should also have to satisfy the due diligence and impeachment standards. To this date, collateral attacks on convictions based upon prosecutorial suppression of evidence have been controlled solely by the *Napue* test. See: *Austin* v. *Wyrick*, 535 F.2d 443, 445 (8th Cir. 1976).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 77-1184

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HERBERT L. HEDGEMAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 CR 42—FRANK J. MCGARR, *Judge.*

ARGUED SEPTEMBER 12, 1977—DECIDED NOVEMBER 2, 1977

Before FAIRCHILD, *Chief Judge,* PELL, and SPRECHER, *Circuit Judges.*

PELL, *Circuit Judge.* This is an appeal from the denial of appellant Hedgeman's motion for a new trial pursuant to Rule 33, F.R.Crim.P., based upon newly dicovered evidence. Hedgeman had been tried on sixteen counts: one count of conspiracy (18 U.S.C. §286), seven counts of false claims (18 U.S.C. § 287), four counts of false statements (18 U.S.C. § 1010), and four counts of aiding and abetting false statements (18 U.S.C. §§ 1010 and 2(a). He was ac-

quitted on two of the substantive counts and was convicted on three counts of § 287, four counts of § 1010, and four counts of §§ 1010 and 2(a). The conspiracy count resulted in a mistrial and the Government dismissed two substantive counts during the course of the trial. Ultimately this court affirmed the convictions as well as affirming the district court's denial of an alternative motion to vacate sentence or grant a new trial, which motion included a *Brady* issue.[1]

The present appeal also in essence claims a *Brady* violation with principal reliance upon the subsequent *United States* v. *Agurs*, 427 U.S. 97 (1976), upon which the Government also relies. Upon first blush, it might appear that the claim had arguable merit; however, from our further examination we are convinced that the prosecutorial suppression contention structured essentially on inference and considerable conjecture aided by hindsight fails to present a proper case for our remanding for a new trial.

The charges against Hedgeman grew out of the performance of his duties as an Area Management Broker for the Federal Housing Administration. Among his duties he was supposed to solicit bids, to make contracts, and to process claims for services in connection with rehabilitation of properties which had been acquired by foreclosure of insured mortgages. Testimony clearly demonstrated that Hedgeman had signed and passed on claims for work that was not performed; that he passed on bids in the names of persons who were not bona fide contractors; and that he filled out and passed on bids that otherwise were not bona fide bids. Proof on one of the counts on which Hedgeman was convicted, Count 17, demonstrated that his original inspection of the property revealed that no garage existed at the site, yet he certified that all repair specifications were met, including the painting of the nonexistent garage.

[1] *Brady* v. *Maryland*, 373 U.S. 83 (1963).

The present appeal centers on the testimony of Pearson, a contractor, who testified that he had regularly paid kickbacks to Hedgeman on contracts that he had received. To support his testimony, the Government introduced through him nine of his work sheets on his contracts, each of which had notations which he said were made at the pertinent times and represented his records of how much he had paid Hedgeman. Pearson, an unindicted co-conspirator, was pursued diligently via the impeachment route and the information thus developed was utilized in oral argument to the jury. It was brought out that he had engaged in illegal acts such as destroying records to impede an IRS investigation and using fictitious names on bids. It was developed that Pearson had agreed at a meeting with Government attorneys while the present trial was in progress to give testimony and that he would not be prosecuted. With regard to the documents in question, the defense counsel examined Pearson on each count, pointing out differences in the color of the ink and possible alterations of the figures. The Government, in our opinion, fairly appraises the tenor of the extensive cross-examination relating to the payment notations as raising the inference that Pearson had recently fabricated these notations. At the meeting at which he had agreed to testify, Pearson brought the exhibits which had been in his possession prior thereto. Before bringing them to the Government, according to Pearson's testimony, he had not had any examinations or tests made of them to determine the age of the writing nor to his knowledge had the Government done so.

The focus now turns to one Purtell, an expert document examiner. Pearson's cross-examination occurred on January 23, 1974. Sometime that day defense counsel called Purtell and was told by him that age of ink determinations could not be made of writings done in ballpoint or fibrepoint pens. As a result of this conversation defense counsel apparently concluded that it was futile to bring the documents over to Purtell for examination. The follow-

ing day Government counsel asked Purtell to meet with them after the conclusion of the day's trial. When he did so, Government counsel learn from him that he had talked to defense counsel the previous day but that he had not been retained.

Purtell then examined one of the documents, making both a visual and microscopic examination. He then asked counsel if any other document examined had looked at the document. Counsel replied in the negative and the question was twice more repeated and twice more denied. Purtell pointed out three spots on the document being examined which he said were the result of "tests for ink" made by a solvent. In response to a question from Government counsel, Purtell said the spots could not have been made by coffee because they were exactly on a line of writing. In his deposition, Purtell said he didn't exactly say that he was convinced that some expert or analyst had previously examined the document but he thought he "made inferences that when somebody was testing the ink, it had to be a document examiner." He specifically denied saying to Government counsel that the spots on the writing were "to determine the age of the writing," and said he was unable to tell whether the test he concluded had been made was to determine the age or the make of ink. He could not go beyond saying that the examiner was "making some determination in regards to the ink."

The specific original document on which the three spots were found by Purtell has never been identified and brought to the attention of this court on appeal. The appendix filed by Hedgeman contains a copy of his motion for new trial to which are attached copies of the exhibits introduced during Pearson's testimony as showing a notation of payment to Hedgeman. There is no indication as to which of the attached copies of exhibits, if any, was the one looked at by Purtell. Each of the exhibits, however, has substantial writing on it in addition to the payment notation. We have no way of being sure that the

spots Purtell observed were on the payment notations or elsewhere; but it does appear because there was only one payment notation and the one document examined had three "solvent" spots, two on one side and one on the reverse, that other writing than the Hedgeman payment notation was involved in at least two of the three spots. Finally, we note that when the respective counsel took the deposition of Purtell on September 22, 1976, there was a cursory effort to examine the exhibits but there was no follow through by the defense counsel to locate and identify the specific exhibit or document which Purtell had observed as having the three spots on it.

The Government counsel, according to his affidavit, after learning that it was not possible to ascertain from an examination the age of the questioned writing, and that defense counsel had already been told the same thing, did not consider the remaining conversation with Purtell other than incidental and did not make a mental connection with Pearson's testimony the previous day that he had not had the documents examined. Government counsel, in any event, did not advise defense counsel of Purtell's remarks about a previous examination. The Government did not call Purtell as a witness. The trial was not concluded until the middle of February, and although the exhibits were available to defense counsel, no effort to subject them to examination was made by that counsel. Some two and a half years later, defense counsel happened to meet Purtell at a restaurant and when asked if he knew him responded, "Oh, yes, I know Dave. I asked him a question in regards to the age of ink and he gave me the answer once." Purtell responded. "That's quite interesting because the next day I was retained by the Federal District Attorney's Office to look at a document for the age of ink, and it was the same one you had talked about." For some reason this conversation, which is set forth in full, triggered a follow-up by defense counsel with the ultimate development of what is now claimed to be newly discovered evidence justifying a new trial.

The essence of the claim is that without Pearson's testimony there would have been no motivation for Hedgeman to have done the things he did, or failed to do; that he was handling the paper work in the manner he had been told to by government officials; that he was acting in good faith (the jury had been instructed that good faith was a complete defense); that while Pearson's testimony was primarily directed to the conspiracy count, as to which there was a mistrial, the fact that the jury may have believed nevertheless that Hedgeman had accepted payoffs would cause the jury to discredit his testimony supporting his good faith defense; and that when the jury became aware of the fact that Pearson had committed perjury in saying that he had not had the document examined the members would conclude that he had lied about Hedgeman's accepting kickbacks and had fabricated the Hedgeman payment notations which would thereby eliminate any motivation for his falsifying the various documents and would ultimately make his claim of good faith credible.

The district court, on the basis of the disposition and documentary evidence submitted to it, after noting that the Government had admitted its knowledge of the defendant's newly discovered evidence, and assuming that this evidence would impeach (if not perjure) Pearson, and further assuming that the evidence was deliberately withheld, stated that it would have to set aside the conviction "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury," citing *United States* v. *Agurs,* 427 U.S. 97 (1976). Noting that the newly discovered evidence related primarily to the conspiracy charge as to which the defendant had not been convicted, the district court found that there was no reasonable likelihood that the testimony of Pearson, if false, could have affected the judgment of the jury.

Putting aside for the moment the correctness of the district court making the assumptions it did, we, indulging in the same assumptions, nevertheless believe that the district court was correct in its finding. *See United States* v. *Johnson,* 327 U.S. 106 (1946). Pearson was substantially impeached. The mistrial on the conspiracy charge to which his testimony was principally directed demonstrates the effectiveness of the impeachment. The additional testimony that solvent had been dropped on three lines of one exhibit while it was in the possession of Pearson, even if it led inexorably to the conclusion that he had the item examined by an expert in the subject to determine whether the age of the ink could be stated, although we have some considerable doubt as to the inexorability of the conclusion, could only have added to the impeachment evidence which the jury did hear, and which, based upon its failure to reach a verdict on the conspiracy verdict, the jury apparently found to be impeaching of Pearson's credibility. Of greater significance, however, is the fact that even if the jury had been convinced that Pearson had perjured himself when he testified that he had not had the document examined, we are unable to believe that the jury could have failed to convict upon the substantive counts in view of the very substantial proof of the specific charges contained in those counts on which Hedgeman was convicted. The defendant argues that without the jury believing that he was taking kickbacks, his testimony would have had greater credibility. This approach pays scant homage to the common sense of the average jury to say that the members would think that a person was acting in good faith when he certified completion of work that had not been performed, passed on bids in the names of persons who were not contractors, and certified a bill for work on a non-existent building. Further, even if Hedgeman had not received kickbacks, the question of motivation would not have been removed from the scene. Hedgeman was not working as a broker on a volunteer basis and it would seem to need no proof of human behaviorism that a person who can be compensated without having to provide the consideration of doing the work for which the compensation was intended has motivation to continue the process.

While, as we have previously indicated, we are of the opinion that the district court reached the correct result

for the correct reason, there are other factors in the present case which we feel are worthy of observation and which also cause us to think that the defendant was not unconstitutionally deprived of a fair trial. In treating the basis for the district court's finding, we entertained the same assumptions which that court did although implicity expressing some doubt as to the propriety of those assumptions. The district court assumed that the evidence would be impeaching if not showing perjury. Yet the jury in so concluding would have had to determine that the evidence of three faint marks on one document, characterized as having been made by a solvent in the hands of an expert documents examiner, raised the clear inference that Pearson, despite his denial under oath, had in fact had an examiner make some type of examination of the document while it was in his exclusive possession. Further, Pearson's testimony which the defendant claimed was perjured, or at the very least impeached, was that he had not had any examinations or tests made to determine *the age* of the writing. Purtell, however, did not claim that the tests were made to determine the age of the ink, and, indeed, expressed the opinion that the age of ballpoint or fibrepoint inks could not be so determined. Further, the district court assumed for the purpose of its ruling that the evidence was deliberately withheld. We recognize in the *Brady* perjury case it is not necessary that there be an intentional withholding if the prosecutor should have known of the perjury. *Agurs, supra* at 103. However, as we have already indicated it does not appear to us that a perjury situation has been demonstrated by the defendant.

In considering the evidence as non-perjurious and its materiality because it was not in fact communicated to the defense, we must again look at the context in which it occurred. The question placed to Pearson as to whether he had had the documents examined to determine the age of the ink was a single question coming at the end of an extensive cross-examination by Hedgeman's counsel. (Page 2406 of the Transcript.) On the next day, after the completion of the day's trial in a conference with

Purtell, Government counsel learned that it was not possible in the opinion of the expert to state the age of the ink. This negative answer to the very purpose for which the Government had requested the examination to be made logically followed the extensive cross-examination of the previous day attempting to suggest a subsequent fabrication by Pearson of the payment negotiations. Because Government counsel knew at that time that defense counsel had also learned from Purtell that no test was available to determine the age of the ink, it is scarcely surprising that the reference to some analyst having made an examination of a particular document would not be equated with an incidental single question occurring during the previous day. The information imparted gratuitously by Purtell, in what appears to us from a reading of the deposition to have been an unfriendly atmosphere, did not pertain to some exculpatory matter bearing upon the innocence of the defendant but at most was applicable to an exhibit in evidence and then only reflected that someone at some undisclosed time had made a test which served no purpose.

In this context, we find the words of Mr. Justice Stevens in *Agurs, supra* at 108-09, particularly applicable:

> The Court of Appeals [here the appellant] appears to have assumed that the prosecutor has a constitutional obligation to disclose *any information* that *might* affect the jury's verdict. That statement of a constitutional standard of materiality approaches the "sporting theory of justice" which the Court expressly rejected in *Brady*. For a jury's appraisal of a case "might" be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If *everything* that *might* influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete [and in the present context continuing] discovery of his files as a matter of routine practice.

> Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much. While expressing the opinion that representatives of the State may not "suppress substantial material evidence," former Chief Justice Traynor of the California Supreme Court has pointed out that "they are under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses." [Emphasis added. Footnote and citation omitted.]

While the rigidity of procedural formalism and obeisance to arbitrary rules have to a large extent given way in modern jurisprudence to an approach sounding in the substance of the merits, nevertheless we cannot be completely unmindful that the posture of the present case is that of a motion for new trial based upon newly discovered evidence. The six points which a party seeking to prevail on such a motion must prove have been long established. *United States* v. *Curran,* 465 F.2d 260, 264 (7th Cir. 1972).[2]

An examination of the present appeal solely in the light of these six points would quickly result in an affirmance here, however, it now seems clear that when the new evidence raises issues which challenge the constitutional validity of the conviction the six points are of

[2] 1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to want of due diligence that it did not come sooner. 3d. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only —viz.:—speaking to facts, in relation which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness.

substantially diminished importance.[3] Thus, we note in *Agurs, supra* at 111, the Court stated that in the situation of prosecutorial suppression of the evidence as opposed to discovery from a neutral source, the defendant should not have to satisfy the burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. Likewise the Government in the present case concedes that there is some question as to the continued validity where a constitutional issue is involved of the requirement that the newly discovered evidence is not merely cumulative or impeaching. Indeed, the District of Columbia Circuit has expressed the view of the inapplicability in the constitutional issue context of the due diligence standard. *Marshall* v. *United States,* 436 F.2d 155, 159 & n.11 (D.C. Cir. 1970).

While we do not necessarily disagree with the D. C. Circuit's statement as a general principle, we do not think in application that it should be carried to the extreme that we find ourselves as arbiters in a case exemplifying *Brady's* "sporting theory of justice." We are of the opinion that at the very least the evidence must be newly discovered, and in this respect it appears to us that failure to exercise diligence can be so obviously bordering on gamesmanship as to place the evidence constructively in the category of non-newly discovered. Thus in *United States* v. *Iannelli,* 528 F.2d 1290, 1293 (3d Cir. 1976), the court held that the "newly discovered evidence" was in fact not newly discovered because the forgery of initials on an authorization for an electronic surveillance, if, in fact, they were forged, could have been discovered at the time of the trial by subjecting the initials to expert handwriting analysis. *Iannelli* did not explicitly treat the *Brady* issue although presumably the Government was aware of whether the initials were those of the person they

[3] We do not need at this time to determine the extent to which the movant for a new trial on the basis of newly discovered evidence and who asserts a constitutional violation is to be treated for all purposes as though he were a petitioner under 28 U.S.C. § 2255.

purported to be and did not communicate this information to the defendant. In *United States* v. *Bermudez*, 526 F.2d 89, 100 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976), the defendant in his Rule 33 motion based on newly discovered evidence did raise a *Brady* issue because of the failure of the Government to disclose state investigative files it had which reflected that state narcotics agents had cooperated with federal agents in an investigation. The court rejected the contention on a due diligence basis because defense counsel was aware of pending state court proceedings and was in a posititon to subpoena state files. While *Bermudez* was pre-*Agurs*,[4] we are mindful that in *Agurs*, *supra* at 108, the Court laid down as an underlying principle that the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.

We have considerable difficulty in saying that Hedgeman was denied a fair trial in a situation in which his counsel attacked vigorously through cross-examination Pearson's testimony that he had in fact made the payment notations at or near the same time that the documents were prepared and not at some later time, in which the defense had the opportunity to have the documents examined by an expert, in which defense counsel talked to an expert, and in which he did not even make the effort to follow through with an examination which if performed by a skilled examiner might have reflected some other aspect bearing upon the time of any particular writing, as it is now claimed that the Government examination did in fact do, even if the age of the ink was not subject to revealing analysis. Indeed, that follow through has not

[4] While it is well established that denial of a petition for certiorari carries with it no approval of the decision which the Court has declined to review, it is interesting to note that in *Bermudez* the petition for certiorari was denied on May 19, 1976, and *Agurs*, which was argued April 28, 1976, was decided on June 24, 1976.

occurred even yet. When a fortuitous conversation which happened two and half years after trial brings to light an evidentiary matter which would have been developed if the available examination had been caused to be made, as it readily could have been, at the time of the trial, we find little persuasive reason to say that the trial was unfair. Ingeniously developed evidence by hindsight should not be permitted to be substituted for that which was readily subject to development at the trial.

For the reasons herein set forth the judgment of the district court is

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

HERBERT HEDGEMAN and
JOSEPH THOMAS,

Defendants.

No. 73 CR 42

MEMORANDUM OPINION AND ORDER

Defendants Herbert Hedgeman and Joseph Thomas have brought a motion for a new trial. Defendants base their motion on the fact that they discovered new evidence in August of 1976 which was allegedly known to and withheld by the prosecuting attorneys at the time of trial in 1974, in violation of the defendants' Fifth Amendment right to due process of law as set forth in *Brady* v. *Maryland*, 373 U.S. 83 (1963).

The government has admitted its knowledge of the defendants' newly discovered evidence. Assuming for purposes of the motion that this evidence would impeach (if not perjure) the government witness Pearson, and assuming this evidence was deliberately withheld, this court would have to set aside the defendants' convictions "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States* v. *Angurs*, 44 L.W. 5013, 5015 (1976). See *Napue* v. *Illinois*, 360 U.S. 264 (1959).

The court first notes that the newly discovered evidence does not seem to relate to testimony involving the conviction of defendant Thomas. Therefore, assuming Thomas

has standing to bring this motion under Rule 33, though not deciding this question, the motion of defendant Thomas for a new trial must be denied.

As to defendant Hedgeman, the court notes that the newly discovered evidence relates primarily to the government's conspiracy charge under 18 U.S.C. §286. A mistrial was declared on this charge and the defendant was not convicted under that count of the indictment. The court finds that there is no reasonable likelihood that the testimony of Pearson, if false, could have affected the judgment of the jury. Thus, defendant Hedgeman's motion for a new trial is denied.

Defendants are hereby ordered to surrender to the custody of the Attorney General on January 24, 1977.

ENTER:

/s/ Frank J. McGarr
United States District Judge

Dated: January 14, 1977

STATUTES

18 USC § 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, *knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.*
June 25, 1948, c. 645, 62 Stat. 698.

18 USC § 2a. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

18 USC § 1010. Federal Housing Administration transactions

Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both. June 25, 1948, c. 645, 62 Stat. 751.

28 USC § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief,

the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105.

CONSTITUTION

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 20, 1977

Before
Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 77-1184 *vs.*

HERBERT L. HEDGEMAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 CR 42
FRANK J. MCGARR, *Judge*

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Herbert L. Hedgeman, defendant-appellant, no judge in active service has requested a vote thereon*, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It Is Ordered that the aforesaid petition for rehearing be, and the same is hereby, Denied.

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* Judge Tone disqualified himself from any consideration of the petition for rehearing *en banc* filed in the above case.

Rule 33.

NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

As amended Feb. 28, 1966, eff. July 1, 1966.

1966 Amendment

Insert, in the first and second sentences, the words "on motion of a defendant" and "on motion of a defendant for a new trial", respectively; substituted, in the first sentence, the word "him" in lieu of "a defendant"; and changed the period, mentioned in the concluding sentence, from 5 to 7 days.